In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:	)	
	)	Adversary Proceeding
CHARLES WILLIAMS	)	
(Chapter 7 Case 98-40928)	)	Number 98-4090
	)	
Debtor	)	
	)	
	)	
ROSALEE WILLIAMS	)	
	)	
Plaintiff	)	
	)	
	)	
v.	)	
	)	
CHARLES WILLIAMS	)	
	)	
Defendant	)	

MEMORANDUM AND ORDER

Debtor/Husband's Chapter 7 case was filed on March 25, 1998. Wife filed this complaint seeking a determination of dischargeability on May 4, 1998. The matter was tried on July 23, 1998. This Court has jurisdiction in this adversary proceeding by virtue of 28 U.S.C. § 1334(b). This adversary is a core proceeding under 28 U.S.C. § 157(b)(2)(I). Based upon the evidence presented at trial and the applicable authorities, I make the following Findings of Fact and Conclusions of Law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

FINDINGS OF FACT

Debtor and Wife were married in 1976 and divorced in 1998. Prior to their marriage, Wife owned a residence which originally belonged to her former husband who is now deceased. She earns about $10,000.00 a year.

Debtor/Husband is a longshoreman who earns considerably more than the Wife, but is suffering from certain medical problems at this stage in his life. Six accounts are in issue:

1) A GM credit card with a balance of approximately $3,300.00;

2) A First Card credit card with a balance of approximately $7,100.00;

3) A Discover card with a balance of approximately $2,600.00;

4) A First Deposit credit card with a balance of approximately $3,300.00;

5) A Penney's credit card with a balance of approximately $450.00; and

6) A Service Merchandise credit card with a balance of approximately $900.00.

The Honorable Michael Karpf filed an Original Judgment and Decree on March 18, 1998, ordering Debtor to pay wife $300.00 per month for six years and ordered the following:

> The Husband shall be responsible for and shall pay in a timely manner the indebtedness owed to the following creditors incurred by him but in the name of the Wife: GM Card, First Card, Discover, First Deposit, J.C. Penney's,

Service Merchandise.

The decree further provided:

> Should the Wife have to meet the monthly payments on said debts, which were incurred by the Husband, she would lose her home.
>
> The Husband and Wife further acknowledge that the payments provided above, are part of equitable division of martial property and shall not be deductible to the Husband for income tax purposes, nor taxable to the Wife. However, the parties further acknowledge that, but for said payments, the Wife would not be able to be financially independent and would depend upon Husband for support on a regular basis in order to provide herself with necessities and meet her monthly expenses.
>
> Therefore, in the event of the bankruptcy of the Husband prior to the payment in full of the above debts for which the Husband is responsible pursuant to his paragraph, payment of said debts is not dischargeable in bankruptcy under 11 U.S.C. 523 as the payments are in the nature of alimony, support, and maintenance.

A final relevant provision was that the Wife was ordered to pay other indebtedness owed to Citibank, Nation's Bank, Belk's and Sears.

Both the GM card and the First Card were used to purchase automobiles which the Debtor either retains or enjoyed the financial benefits from at an earlier time. During the course of the trial, Debtor's counsel conceded that because of the nature of the charges on these two cards, Debtor would no longer dispute that the GM and First Card debts are non-dischargeable. Given Debtor's concession, therefore, four cards remain in issue.

During trial, the parties disputed their relative earning capacity but for 1996, the last joint tax return available, the parties' total income was $25,347.00. Of this, approximately $15,000.00 was his and $10,000.00 was hers. In addition, he has passed the retirement age of 65 and therefore earns tax-free benefits in the amount of $758.00 a month from Social Security. These benefits are suspended from time to time when the Social Security Administration learns or believes that his income will exceed the ceiling on earned income for any given year.

Evidence revealed the following concerning the remaining four accounts. The Discover card was issued in his name and it was uncontradicted that the Wife used it only sparingly. The First Deposit card was issued with the Wife as the primary obligor, but she never used it. He used it exclusively and a number of the charges were made either to obtain a down payment for one of the vehicles he purchased or to perform repairs on the vehicles which he purchased with other cards or both. While the Penney's card was initially issued in his name, he suffered a period of incarceration and Penney's changed the name to show her as the primary obligor at the time they learned he was in prison. Evidence revealed that he has charged on this card after the parties' separation on some occasions. The Service Merchandise card was listed in his name and both of them used it, but one of the larger ticket items for which it was used was a CD player which remains in his possession.

The aggregate amount of debts that the Wife was ordered to pay to CitiBank, NationsBank, Belk's and Sears was nearly $7,000.00. The Wife's contentions are essentially twofold. First, she contends that all issues were previously heard and resolved by Judge

Karpf and that *res judicata* should entitle her to judgment. Second, she contends that the Husband can earn up to $15,000.00 a year plus $758.00 per month in Social Security and that as contrasted with the Wife's income, the provisions for payment of these obligations was clearly in the nature of support.

Legal Framework of Domestic Issues in Bankruptcy

11 U.S.C. §§ 523(a)(5) and (15) provide:

> (a) A discharge under section 727, 1141, 1228[a] 1228(b), or 1328(b)[1] of this title does not discharge an individual debtor from any debt--
>
> (5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that--
>
> (B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support;
>
> (15) not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, a determination made in accordance with State or territorial law by a governmental unit unless--
>
> (A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and,

[1] 11 U.S.C. § 1328(a)(2) excepts Section 523(a)(5) debts but does not except Section 523(a)(15) debts.

> if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or
>
> (B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor;

Prior to the enactment of subsection (15), the determination of whether a debt was considered support, either in the form of alimony or child support, was dispositive. If the debt was held to be alimony or child support then it was non-dischargeable. If not, then it was not within an exception and was therefore discharged. 11 U.S.C. §§ 727, 523. A bankruptcy court was only to perform a "simple inquiry" to determine if the debt could be legitimately characterized as support at the time of the divorce. *See* In re Harrell, 754 F.2d 902 (11th Cir. 1985).

The passage of subsection (15) introduced a far different analytical exercise. If a debt fails to qualify under Harrell as being actually in the nature of support, subsection (15) provides that there is no *per se* rule discharging the debt. A bankruptcy court must instead engage in a two-part test (1) to determine debtor's current ability to pay, and (2) to balance the relative benefit and detriment of a discharge.

First, it is important to note that a true pre-petition division of property, which is not subject to challenge as a voidable preference or fraudulent conveyance, is unaffected by bankruptcy. Thus, if title to property is awarded through the course of domestic relations proceedings, that award ordinarily will be unaffected. *See* Bush v. Taylor,

912 F.2d 989 (8th Cir. 1990); *see also* Matter of Hall, 51 B.R. 1002 (S.D.Ga. 1985) (under Georgia divorce law property delivered to spouse upon "equitable distribution" becomes sole and separate property of that spouse). The typical issue, however, is whether an order requiring a debtor to pay a debt that encumbers an award of property made during divorce proceedings is dischargeable.

Because the state has a strong interest in domestic relations matters, bankruptcy courts are to grant great deference in deciding cases involving divorce, alimony, child support, child custody, establishment of paternity, etc. *See* Carver v. Carver, 954 F.2d 1573, 1579 (11th Cir. 1992), *cert. denied*, 506 U.S. 986 (U.S.Ga. 1992) ("Nor was it the intent of the new Bankruptcy Code to convert the bankruptcy courts into family or domestic relations courts - courts that would in turn willy-nilly, modify divorce decrees of state courts insofar as these courts had previously fixed the amount of alimony and child support obligations of debtors").

I. Burden of Proof

The burden of proof in establishing the Section 523(a)(5) or (15) exception is on the non-debtor spouse. Grogan v. Garner, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991). However, although exceptions from discharge are normally construed strictly against the objecting creditor in order to provide the debtor with a "fresh start," *see* In re St. Laurent, 991 F.2d 672, 680 (11th Cir. 1993), policy considerations require a bankruptcy court to construe domestic relations exceptions more liberally. In re Kline, 65 F.3d 749, 751 (8th Cir. 1995); In re Miller 55 F.3d 1487, 1489 (10th Cir. 1995), *cert. denied*, 516 U.S. 916, 116

S.Ct. 305, 133 L.Ed.2d 210 (1995).

Because of passage of Section 523(a)(15), all debts arising from a divorce or separation agreement or a decree are *prima facie* non-dischargeable. Matter of Cleveland, 198 B.R. 394, 397 (Bankr. N.D.Ga. 1996). Under Section 523(a)(5), the non-debtor spouse must show that the obligation in issue is actually in the nature of support; however, under Section 523(a)(15), the non-debtor spouse must only show that the debt was incurred during the course of a divorce or separation. *See* In re Stone, 199 B.R. 753, 783 (Bankr. N.D.Ala. 1996). If this burden is met, the burden of going forward shifts to the debtor to either rebut the evidence that the provision is actually in the nature of support under Section 523(a)(5) or offer a *prima facie* case in support of either exception under Section 523(a)(15). Id. at 783; In re Gantz, 192 B.R. 932, 936 (Bankr. N.D. Ill. 1996); In re Anthony, 190 B.R. 429, 432 (Bankr. N.D.Ala. 1995). The ultimate burden remains with the creditor seeking to except the debt from discharge. *See* In re Stone, 199 B.R. at 783. The relevant time for making the Section (a)(5) analysis is the time of the decree, In re Harrell, 754 F.2d at 902, and the Section (a)(15) analysis is the date of the trial in bankruptcy. *See* In re Dressler, 194 B.R. 290 (Bankr. D.R.I. 1996); In re Morris, 193 B.R. 949, 952 (Bankr. S.D.Cal. 1996). *Cf.* In re Walford, Adv. Pro. No. 97-01026A (Bankr. S.D.Ga. Aug. 29, 1997), (Dalis, C.J.) (holding that relevant time is at bankruptcy petition date, but does not preclude consideration of disposable income at time of trial.)

II. Section 523(a)(5)

Whether a debt is dischargeable pursuant to Section 523(a)(5) is still a

matter of federal law, not state law. In re Harrell, 754 F.2d at 905. In that regard, the bankruptcy court must independently assess the character of an obligation arising out of a divorce and determine whether it is in the nature of alimony. *See* Id. at 905; In re Williams, 151 B.R. 605, 607 (Bankr. M.D.Fla. 1993). Section 523(a)(5) requires that the bankruptcy court determine nothing more than whether the payment obligation is in the nature of "alimony, maintenance, or support." No precise inquiry into the parties' present financial circumstances is required; only a simple inquiry into the nature of the obligation, liquidating known amounts and leaving any issue of future modifications to the applicable state court. In re Harrell, 754 F.2d at 907 (11th Cir. 1985); In re Christenson, 201 B.R. 298 (Bankr. M.D.Fla. 1996).

In determining whether a debtor's obligation is in the nature of support, the intent of the parties [or the trier of fact] at the time of the settlement agreement or trial is dispositive. In re Sternberg, 85 F.3d 1400, 1405 (9th Cir. 1996); In re Sampson, 997 F.2d 717, 723 (10th Cir. 1993) ("the critical inquiry is the shared intent of the parties at the time the obligation arose"). While a label placed upon spousal obligation is not dispositive in determination of dischargeability, it is indicative of the parties' intent. *See* Matter of Bell, 189 B.R. 543, 547 n.2 (Bankr. N.D.Ga. 1995); In re MacDonald, 194 B.R. 283, 187 (Bankr. N.D.Ga. 1996).

The most critical factors to be considered in interpreting the intent of the provision in issue include: (1) any disparity in parties' earning capacities; (2) parties' relative business or employment opportunities; (3) parties' physical condition; (4) their

educational background; (5) their probable future financial needs; (6) benefits that each party would have received if marriage had continued. Matter of Dennis, 25 F.3d 274 (5th Cir. 1994), *cert. denied*, 513 U.S. 1081 (1995); *see also* In re Bedingfield, 42 B.R. 641 (S.D.Ga. 1983) (holding that a court should also consider whether the obligation terminates upon death or remarriage).

III. Section 523(a)(15)

If the Court finds that an obligation is not actually in the nature of support, the debt is dischargeable under Section 523(a)(5). It is, nevertheless, excepted from discharge under Section 523(a)(15) unless an exception to the exception is established.

(a) Section 523(a)(15)(A); Ability to Pay

Under Section 523(a)(15)(A), an obligation arising from a division of property may be discharged if a debtor can demonstrate that he does not have the ability to pay such debt due to other reasonably necessary expenses. In these instances, courts have adopted a twofold analysis. First, using the disposable income test, a court must determine "whether the debtor's budgeted expenses are reasonably necessary." In re Hill, 184 B.R. 750, 755 (Bankr. N.D.Ill. 1995). Second, Section 523(a)(15)(A) requires a court to consider a debtor's "ability to pay." 11 U.S.C. § 523(a)(15). In that regard, a court must view the debtor's general "ability to pay" and not permit the debtor to rely on a "snapshot" of his financial abilities at the time of filing. *See* In re Smither, 194 B.R. 102, 107 (Bankr. W.D.Ky. 1996) (holding that court must consider prospective earning capacity rather than a snapshot); In re Anthony, 190 B.R. 433 (Bankr. N.D.Ala. 1995). I adopt the holding of my

colleague, Chief Judge Dalis, that factors affecting ability to pay include:

> (1) disposable income at the time of trial;
>
> (2) presence of more lucrative employment opportunities;
>
> (3) any relief of debt expected in short term; and
>
> (4) the extent to which the debtor has made a good faith attempt to obtain employment to satisfy the debt.

In re Walford, Adv. Pro. No. 97-01026A (Bankr. S.D.Ga. Aug. 29, 1997). If, after excluding expenses reasonably incurred, a court determines that a debtor does not have the "ability to pay," the debt is discharged. If the debtor has the "ability to pay," he still may attempt to discharge the debt pursuant to Section 523(a)(15)(B).

(b) 523(a)(15)(B); Balancing Benefit/Detriment

Under Section 523(a)(15)(B), a debtor may discharge the obligation if it is demonstrated that the benefit of a discharge outweighs the detrimental consequences to the objecting party. This section essentially requires a court to "balance the equities" by considering a number of factors, including income and expenses of both parties; whether the non-debtor spouse is jointly liable on the debts; the number of dependents; the nature of the debts; the reaffirmation of any debts; and the non-debtor spouse's ability to pay. *See* In re Hill, 184 B.R. at 756; *see also* In re Adams, 200 B.R. 630 (N.D.Ill. 1996); Taylor v. Taylor, 199 B.R. 37, 41 (N.D.Ill. 1996); In re Custer, 208 B.R. 675, 682 (Bankr. N.D.Ohio 1997); In re Cleveland, 198 B.R. 394, 400 (Bankr. N.D.Ga. 1996); In re Smither, 194 B.R. at 110-

11.

CONCLUSION

In this case I find that the Debtor's obligation to pay for the four remaining cards is nondischargeable under Section 523(a)(5). Despite the language in the divorce decree which labels the payments as an "equitable division of property," the intent of the parties must control. The decree goes on to indicate that both parties intended for the payments to be "in the nature of alimony, support, and maintenance." Even construing the decree against the drafter, Ms. Williams, this language is consistent with the understanding that without these payments, Wife would lose her home and would be dependent upon the Husband for more support than was awarded. The payments on the four credit cards are thus nondischargeable pursuant to Section 523(a)(5) as being in the nature of support of the Wife.

In the alternative, I find that even were these payments not in the nature of support, and thus excepted from discharge pursuant to subsection (a)(5), Husband has not met his burden under subsection (a)(15) to render the debt dischargeable. Husband earns more money per year than does Wife, and has not presented any evidence to rebut this finding of fact. At a minimum, he earns $780.00 in tax-free benefits from Social Security, in addition to whatever he earns below the cap, which according to his testimony is $14,500.00. I find that Husband thus has the ability to pay these debts as contemplated by Section 523(a)(15)(A). I find further that Husband has failed to establish that the benefit he would receive from a discharge of this debt would outweigh the detrimental consequences

to the Wife as contemplated by Section 523(a)(15)(B). Most of the charges on the credit cards inured to the benefit of the Husband. To require the Wife to pay these debts and face the loss of her home and financial independence would render an inequitable result. Husband having failed to meet his burden to establish either exception to the exception, I make the alternative finding that the debts are nondischargeable pursuant to Section 523(a)(15).

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that the obligation for the credit cards debts in favor of the Plaintiff, Rosalee Williams, is excepted from discharge and judgment is hereby entered for the Plaintiff.

United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of September, 1998.